United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1125

B P/S 5/3

To be argued by
DAVID J. GOTTLIEB

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

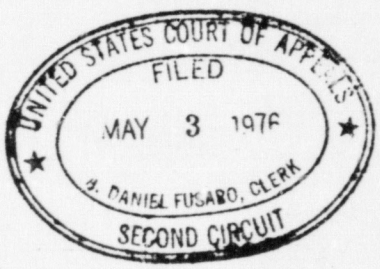
Plaintiff-Appellee,

-against-

WILLIE LEE UNDERWOOD,

Defendant-Appellant.

Docket No. 76-1125



BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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CONTENTS

TABLE OF CASES

OTHER AUTHORITIES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, -against- WILLIE LEE UNDERWOOD, Defendant-Appellant.	Docket No. 76-1125

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether appellant Underwood's Grand Jury testimony was taken in violation of his Fifth and Sixth Amendment rights.

2. Whether appellant Underwood was denied the effective assistance of counsel at sentencing when he was represented by an associate of trial counsel who made no effort to verify the accuracy of the presentence report or to submit evidence in mitigation.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This appeal is from a judgment of the United States District Court for the Southern District of New York (The Honorable Richard Owen) entered on December 5, 1975, convicting appellant Willie Lee Underwood, after a trial before a jury, of twenty-two counts of unlawful possession of checks stolen from the mails (18 U.S.C. §1708) and twelve counts of uttering and publishing a forged writing with the intent to defraud the United States (18 U.S.C. §495). Appellant was sentenced to concurrent terms of three years' imprisonment on the forgery counts and one uttering count (Counts 1, 9, 10, 12-16, 20, 22, 25, 27, 28, 30, and 40). Appellant was also sentenced on eleven of the uttering counts (Counts 43-53) to six years' imprisonment, with execution of the sentence suspended and five years' probation imposed, with a special condition of probation that appellant make restitution as supervised by the Probation Department.

This Court assigned The Legal Aid Society, Federal Defender Services Unit, as counsel for appellant Underwood on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

A. The Motion to Dismiss the Indictment

On January 22, 1975, appellant Willie Lee Underwood was arrested on a complaint of Treasury Department agent Terry Chodash charging appellant with a violation of 18 U.S.C. §495. At 2:30 p.m. that day, appellant was brought before a United States Magistrate and informed of the charge against him. Appellant appeared with retained counsel, who soon thereafter filed a notice of appearance to the action.[1]

On April 14, 1975, appellant was served with a subpoena directing him to appear before a Grand Jury in connection with "alleged violations of Title 18 United States Code Sections 495 and 1208."[2]

The following day, at 5:00 p.m., appellant's retained counsel, Edward Bobick, telephoned Assistant U.S. Attorney Paul Vizcarrondo, Jr., the attorney designated to present the case to the Grand Jury, and inquired whether appellant was being asked to appear before the Grand Jury as a "witness against someone else" or "in the matter where Mr. Underwood

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[1]See Complaint and Record of Proceedings, United States v. Underwood, Magistrate's Doc. No. 75, Case No. 98, reproduced as Exhibit D in appellant's separate appendix.

[2]See Affidavit in Opposition to appellant's Motion to Dismiss the Indictment, dated May 15, 1975, reproduced as Exhibit F in appellant's separate appendix.

was the defendant."[3] Vizcarrondo informed counsel that appellant was a target of the investigation and that he would be asked questions before the Grand Jury in connection with that investigation. Mr. Bobick replied that he would advise Underwood to assert his privilege against self-incrimination and that someone from his office "would be present with Mr. Underwood on the return date of the subpoena to advise the defendant of his rights and as to what procedure to follow before the Grand Jury."[4]

On April 16, at 12:30 p.m., Mr. Vizcarrondo left the Grand Jury room to summon appellant. Appellant's counsel was not yet present outside the Grand Jury room to advise his client. Without waiting for counsel to arrive, or asking appellant whether he wished to wait until his counsel was present, Vizcarrondo directed appellant to accompany him into the Grand Jury room. After Mr. Underwood was sworn by the foreman, the U.S. Attorney advised him as follows:

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[3] See appellant's Motion to Dismiss the Indictment, dated April 22, 1975, and appellant's Reply Affidavit, dated May 20, 1975, reproduced as Exhibits E and G respectively in appellant's separate appendix.

[4] See appellant's Motion to Dismiss the Indictment. The Assistant U.S. Attorney had a slightly different recollection of this part of the telephone conversation: "Mr. Bobick stated that he would see me the next day. I have no memory, nor do my notes of the conversation indicate, that Mr. Bobick asked me not to call Underwood before the grand jury until he or one of his associates was present." Affidavit in Opposition to Motion to Dismiss at 2.

> I advised him of the nature of the investigation; that he had a right to refuse to answer any question that might tend to incriminate him personally in any way; that anything he said before the Grand Jury could be used against him at another time in a Court of law; that he had a right to have an attorney of his choice outside the Grand Jury room and to go outside and and consult with that attorney before he answered any questions; that if he wished to have the assistance of an attorney but could not afford one, the court would appoint an attorney to represent him; and that if he deliberately told a lie to the Grand Jury he subjected himself to possible prosecution for the crime of perjury.[5]

Mr. Underwood "indicated" that he understood the warnings, and questioning apparently commenced.

Approximately fifteen minutes after appellant entered the Grand Jury room, Steven Schlesser, Esq., an associate from Mr. Bobick's office, appeared outside the Grand Jury room and knocked on the door. Mr. Vizcarrondo then informed appellant that his attorney was outside and that appellant could consult with him if he wished. Mr. Underwood immediately asked if he could talk to his attorney, was afforded the right, and left the Grand Jury room. Appellant talked to his attorney for five minutes and returned to the Grand Jury room, where he exercised his right to remain silent.[6]

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[5] Affidavit in Opposition to Motion to Dismiss the Indictment at 2-3.

[6] See appellant's Motion to Dismiss the Indictment.

On April 17, 1975, the Grand Jury returned an indictment charging appellant with thirty-nine counts of possession of stolen checks and fourteen counts of uttering forged endorsements.[7] Five days later appellant moved to dismiss the indictment, on the ground that the interrogation of appellant before he was granted the opportunity to consult with counsel, who the Assistant U.S. Attorney knew would be present, violated appellant's Fifth and Sixth Amendment rights.[8] After a brief hearing, where the allegations in the moving papers were repeated, the court, without opinion, denied appellant's motion.[9] Accordingly, appellant proceeded to trial, before The Honorable Richard Owen and a jury.

B. The Trial Evidence

The Government's theory of the case was that appellant acted as a "fence" for stolen checks, which he purchased at a

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[7] A copy of the indictment is annexed as Exhibit B to appellant's separate appendix. On October 20, 1975, immediately prior to trial, the Government moved to dismiss Counts 2-8, 11-12, 17-19, 21, 23, 24, 26, 29, 41, and 42 of the indictment. The motion was granted, on consent of the defendant, leaving thirty-four counts remaining in the indictment.

[8] See appellant's Motion to Dismiss the Indictment and appellant's Reply Affidavit.

[9] The court's decision may be found on the back of appellant's Motion to Dismiss the Indictment, annexed as Exhibit E to appellant's separate appendix.

discount and then transferred through his business, Willie's Meat Market, in return for groceries or other services. The bulk of the evidence presented to support that theory consisted of testimony by the payees and recipients of thirty-seven forged checks, thirty-four of which were charged in the indictment and three of which were admitted as "other crimes evidence," purportedly relevant to appellant's state of mind (116-118[10]).

Twenty-eight payees testified that they expected to receive a particular city, state, or Federal check; that the particular check, with their name on it, had never been received; that they did not sign the endorsement on the back of the check, or authorize anyone else to write it; that they had never met appellant on a previous occasion; and finally that they had never before shopped at Willie's Meat Market (3-6, 9-12, 15-18, 21-23, 27-29, 32-34, 36-38, 41-43, 44-46, 52-58, 59-61, 63-65, 68-70, 75-78, 83-85, 89-92, 95-97, 99-101, 105-106, 110-112, 112-114, 119-122, 125-128, 128-130, 133-135, 135-137, 138-140, 141-143). The same testimony as above was admitted by stipulation with respect to the remaining payees (143-144).

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[10] Numerals in parentheses refer to pages in the transcript of the trial.

Testimony was also taken from fourteen merchants, route drivers, and clerks who received the thirty-seven checks admitted into evidence. The checks were negotiated to them by appellant in return for wholesale merchandise, rent, or other services necessary to the meat market, and the circumstances surrounding the transactions differed from witness to witness. On a number of occasions appellant assured the transferee that he personally knew the individual who had presented him with the check (see, e.g., 248, 281, 324-325); on other occasions the transactions occurred without oral representations (see, e.g., 240, 266, 299, 315, 350). The circumstances following the return of the checks as forgeries also differed. On some occasions appellant attempted to reimburse the merchant for the checks returned with payment stopped (see, e.g., 278, 339, 351); for other merchants there could be no reimbursement, as many of the checks were returned after appellant's store had already ceased operation (see, e.g., 250, 279, 300, 305, 341. 413).

The Government also presented an alleged accomplice, one Jose Rodriguez, who testified that he stole, forged, and then sold appellant several of the checks admitted into evidence. Despite his recent guilty plea and probationary sentence in Federal court, Rodriguez denied receiving any promises or threats in return for his testimony other than an assurance by the Government prior to trial that there would be no further prosecutions for his already stolen checks (145-146, 150-153,

159). Rodriguez alleged that he was introduced to appellant by a man named Linwood, and that during this meeting appellant invited the witness to bring him checks (155). Soon thereafter, Rodriguez returned with eight to ten checks worth $1,000. Rodriguez had forged the endorsements of the named payees, after stealing the checks from various mail boxes (156-158). Appellant agreed to pay Rodriguez $200 for the checks (157). Rodriguez asserted that he witnessed appellant endorse and transfer some of the checks in payment for merchandise (161). He also claimed that the procedure was repeated on subsequent occasions in the presence of other individuals and that he witnessed other people selling checks to appellant under similar circumstances (163-167). Rodriguez identified his forged endorsement on seven checks, all of which he claimed to have transferred to appellant (168-171).[11]

Finally, Secret Service Agent Patrick McCool and Postal Inspector Edward Mackin testified to statements made by appellant during interrogation by the agents. McCool interviewed appellant on January 21, 1974, concerning a few checks (406-408). Mackin testified to a more extended interview on January 21, 1975, the day before appellant's arrest, at which appellant admitted negotiating a number of allegedly forged checks (389). Appellant stated that the checks, four of

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[11] By stipulation testimony was also admitted from a handwriting expert supporting the contention that Rodriguez had forged the indicated endorsements (424-426).

which were included in the indictment, were accepted from customers in the store, some of whom he knew personally (390).

Following summations and the charge, the jury found appellant guilty of all twenty-two counts of possession of stolen checks and all twelve uttering counts (505-508).

C. The Sentencing

Appellant appeared for sentencing on December 5, 1975, accompanied by Steven Rochkind, Esq., an associate of trial counsel. Rochkind stated he was "step[ping] in" since trial counsel could not attend the hearing because his wife was undergoing surgery that morning (521).

The Assistant U.S. Attorney recommended that the court impose a probationary sentence with the condition that appellant make restitution to the victims of the crime, to supplement any term of incarceration which might be imposed. In support of his request, the prosecutor alleged that during the period appellant was engaged in his criminal activity he maintained a substantial bank balance; that there was as much as $2,000 moving in and out of his account each month, with an inflow of some $25,000 in one year; that appellant at one time owned two automobiles; that both appellant and his wife worked; and that therefore a sentence of restitution would be appropriate and realistic (522).

Defense counsel submitted no documentary evidence to

establish appellant's financial status. Moreover, the record indicates that appellant never requested the opportunity to examine the presentence report (522-523).

Instead, after stating that he had known appellant for a number of years, having represented him on some civil cases, counsel offered the following statement in mitigation:

> As Your Honor was aware, these charges arose out of Mr. Underwood's concern called Willie's Meat Market. The balance that was in the banks, the checks that were taken by Mr. Underwood, were used to pay off debts to suppliers; that Mr. Underwood's sole attempt in this was to keep his business going and to try to attempt to make a living for his family.
>
> I am not condoning it at all. I never would stand here and try to condone such acts, but I would like to point out that there was no great personal gain that was made from this.
>
> Mr. Underwood is married. His wife is here. He has seven children. He is now working again as a butcher for Southland Meat Market. That is his livelihood. This is all he has known. His life style, as far as I have known it, regarding even the fees that he had paid us, has been very, very low.
>
> He is attempting to make a living for his family and that is all he has attempted to do. He is not riding around in big cars, taking fancy vacations and having big accounts somewhere.
>
> I ask Your Honor that in view of these circumstances to be as lenient as possible in sentencing Mr. Underwood.
>
> (523-524).

The District Court disagreed with counsel's allegation

that appellant engaged in this conduct only to keep his business afloat, and concluded, "[t]hat's the way you run the business" (524). After citing appellant's long history as a fence for stolen checks, the Court pronounced sentence as follows:

> I am going to sentence you to three years on counts 1, 9-10, 13-16, 20, 22, 25, 27-8, 30 and 40, and each of those counts to run concurrently.
>
> On counts 43 to 53 I will sentence you to six years and suspend the sentence and place you on probation for six years and provide as a special condition of probation that you make restitution to the appropriate city agencies or federal agencies that were required to make good on these checks to their recipients, all of whom we heard testify here did not get their checks and had them made good by various government agencies.
>
> And that is the sentence of the court.
>
> MR. DEVORKIN: Your Honor, could I just inform the Court that I believe the victims are the merchants and not the city and the state, at least with respect to most of these checks. The federal government does not suffer loss.
>
> THE COURT: Well, to the extent that the merchants have been injured here the restitution shall go to them and this restitution shall be supervised by the probation department of this court.
>
> (525-526).
> Emphasis supplied.[12]

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[12]The Clerk's judgment order filed in the case differs from the court's oral sentence in two respects. It reports appellant as being sentenced, inter alia, on counts 30-40, rather

Judge Owen then denied appellant's application for release pending appeal after Mr. Rochkind, admitting his unfamiliarity with what had occurred at trial, was unable to cite any grounds upon which the judgment might be reversed (527).

On March 16, 1976, more than three months after filing appellant's notice of appeal, counsel moved pursuant to Rule 35, Federal Rules of Criminal Procedure, for an order reducing appellant's sentence. Counsel's motion, submitted without any supporting materials, was predicated upon allegations about appellant's family ties, work record, and the motivation underlying the criminal act. Counsel also made assertions "upon information and belief" concerning appellant's criminal record. The motion was denied without a hearing on March 17, 1976.

(Footnote continued from the preceding page)

than the court's announced sentence on counts 30 and 40. The order also reports appellant's probationary sentence as five years, instead of the six-year period indicated in the transcript.

ARGUMENT

Point I

APPELLANT'S GRAND JURY TESTIMONY WAS TAKEN IN VIOLATION OF HIS FIFTH AND SIXTH AMENDMENT RIGHTS.

On April 14, 1975, more than two months after his arrest, appellant received a subpoena compelling his appearance before a Grand Jury. Upon notification of the subpoena, appellant's retained counsel informed the Assistant U.S. Attorney that he would be present to advise appellant, the actual target of the Grand Jury investigation, before appellant testified. Yet on the date of appellant's appearance when counsel was just a few minutes late in arriving, the Assistant U.S. Attorney quickly ordered appellant to enter the Grand Jury room. Appellant was never warned of his right to consult with counsel before his appearance. Instead, after the inexperienced witness was sworn by the foreman, the prosecutor administered incomplete and potentially misleading Miranda warnings, and appellant, not surprisingly, began testifying.

The testimony thus obtained was taken in violation of appellant's Sixth Amendment right to counsel (United States v. James, 493 F.2d 323 (2d Cir.), cert. denied, 419 U.S. 849 (1974); cf. Kirby v. Illinois, 406 U.S. 682 (1972); United States ex rel. Robinson v. Zelker, 468 F.2d 159 (2d Cir. 1972),

cert. denied, 411 U.S. 939 (1973)), as well as appellant's Fifth Amendment rights (United States v. Mandujano, 496 F.2d 1050 (5th Cir. 1974), cert. granted, 420 U.S. 989 (1975); United States v. Rose Wong, No. 74-1636 (9th Cir., September 23, 1974), petition for certiorari filed, 43 U.S.L.W. 3392 (U.S., November 22, 1974)(No. 635); cf. United States v. Jacobs, No. 75-1319, slip op. 2111 (2d Cir., February 24, 1976)). Accordingly, the case should be remanded for a determination of whether there is sufficient evidence independent of appellant's testimony to support the indictment. See United States v. James, supra.

In Kirby v. Illinois, supra, 406 U.S. at 689, the Supreme Court reaffirmed that the Sixth Amendment right to counsel attaches with the initiation of adversary proceedings, "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." Whatever the operative occurrence, it is the "initiation of the adversary judicial criminal proceeding" which triggers the right to the assistance of counsel. In this case, the arraignment before a magistrate on the complaint of Officer Chodosh, occurring two months before the Grand Jury proceeding, began the formal action against appellant, and his right to counsel vested. See United States v. James, supra. In contrast to the time between arrest and commencement of legal proceedings, during which a defendant is entitled during custodial interrogation to counsel upon request, as an aid in protecting his Fifth Amendment privilege,

appellant was now entitled to legal representation under the Sixth Amendment, i.e. to the presence of his lawyer before the commencement of any interrogation. Cf. Massiah v. United States, 377 U.S. 701 (1964); White v. Maryland, 373 U.S. 59 (1963); United States v. Durham, 475 F.2d 208 (7th Cir. 1973). While, because of the special nature of the Grand Jury, appellant may not have had the right to an attorney inside the Grand Jury room (In re Groban, 352 U.S. 330 (1957)), he certainly had the right to the presence of counsel outside the Grand Jury room for consultation before and during his appearance at the Grand Jury. United States v. James, supra; see Perrone v. United States, 416 F.2d 464 (2d Cir. 1971); United States v. Capaldo, 402 F.2d 821, 824 (2d Cir. 1968), cert. denied, 394 U.S. 989 (1969); People v. Ianniello, 21 N.Y.2d 418 (1963).

Appellant's right to consult with counsel was clearly violated when the Assistant U.S. Attorney insisted upon calling appellant before the Grand Jury before his attorney arrived on the scene. This action was hardly inadvertent, for the night before, appellant's counsel specifically informed the Assistant U.S. Attorney that he would be present to advise his client to assert his right against self-incrimination. Of course, the Assistant U.S. Attorney may have been entitled to call appellant before the Grand Jury to ensure that appellant would exercise his privilege. See United States v. Wolfson, 405 F.2d 779, 784 (2d Cir. 1968), cert. denied, 394 U.S. 946

(1969). However, neither the Assistant U.S. Attorney's schedule nor counsel's momentary tardiness justified placing this unsophisticated layman in front of the Grand Jury absent an opportunity to consult with counsel. See United States v. James, supra. Indeed, the precipitate action of placing appellant before the Grand Jury when the prosecutor knew that counsel would probably soon be arriving raises the possibility of a bad faith attempt to circumvent appellant's right to counsel. And it is hard to conceive of a case where the advice of counsel was more necessary, given some of the choices faced by this target defendant: perjury, self-incrimination, or contempt.

The practice of calling a charged and uncounseled target defendant without a prior opportunity to consult with counsel was specifically condemned in United States v. James, supra, 493 F.2d at 325 ("No effort was made to obtain counsel for him or to give him an opportunity to consult counsel before he was brought into the Grand Jury room. He was advised of his constitutional rights only when he was put on the stand before the Grand Jury"). In James, the violation of the defendant's right to counsel was more blatant, since counsel had never been assigned. However, it was no more effective than the denial here.

Moreover, the record is utterly insufficient to show that appellant knowingly and intelligently waived the assistance of counsel. Of course, appellant never waived his right to con-

sult with counsel prior to his testimony, for he was never advised that he had such a right. Nor was the single recital of Miranda warnings during the Grand Jury hearing sufficient to demonstrate a waiver of Sixth Amendment rights under the facts here.

First, appellant, through his attorney's phone call the previous night, had already requested that interrogation not commence in the absence of counsel. Having made such a request, appellant should never have been questioned until his attorney arrived for consultation. Cf. Miranda v. Arizona, 384 U.S. 436 (1966); United States v. James, supra.

Moreover, even if the incantation of Miranda warnings was not rendered legally irrelevant by appellant's previous request for counsel, they were still inadequate in the circumstances of this case to demonstrate a knowing waiver of either appellant's Fifth or Sixth Amendment rights. For, while appellant was informed before the Grand Jury of his right to consult with an attorney of his choice, he was not informed of the far more important fact that he could consult with his retained attorney before answering any questions. That appellant's "waiver" without this warning was not voluntary and intelligent was demonstrated beyond cavil by the sequence of events when appellant's counsel actually appeared. At that moment, appellant was informed that his attorney had arrived and was asked whether he wished to consult with him. Appellant immediately answered "yes," and exercised his Sixth Amend-

ment right to consult with counsel. Given his actions when counsel arrived, it is impossible to read the previous brief acknowledgment made by this unsophisticated defendant that he understood the warnings as a knowing and intelligent waiver.

The warnings proffered to appellant were insufficient for at least two other reasons. First, there was no express warning to appellant that he was the target of the Grand Jury investigation. Such a warning is explicitly required under the recent decisions of this Court in United States v. Jacobs, supra, No. 75-1319, slip op. 2111; accord, United States v. Mandujano, supra; United States v. Washington, 323 A.2d 98, 100 (D.C. Ct.App. 1974)). Concededly, the Assistant United States Attorney informed appellant's retained counsel, on the night prior to appellant's Grand Jury appearance, that appellant was the target of the investigation. Regretably, however, the Assistant U.S. Attorney refused to wait until counsel arrived the next day to afford counsel an opportunity to consult with his client and inform him of that fact. Absent any evidence that counsel consulted with appellant prior to his appearance before the Grand Jury to inform him of his "target" status, the Assistant U.S. Attorney was obliged to furnish such warnings to appellant.[13] His failure to do so requires

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[13]Counsel's statement in his reply affidavit that "[t]his is not a case where a witness is unaware as to whether or not he is the target of the investigation" is not dispositive of the Government's obligation in this case. The record does not

suppression of appellant's testimony.

Furthermore, appellant was never warned that he had the right to remain silent, but only that he could refuse to answer any question that might tend to incriminate him. While technically correct, such a warning was totally inadequate to apprise a layman, unwary of the dimensions of the self-incrimination privilege, a to exactly what his rights were. Only an explicit statement that appellant had the right to remain silent could suffice. United States v. Mandujano, supra; United States v. Rose Wong, supra; see, e.g., United States v. Corallo, 413 F.2d 1306, 1328-1329 (2d Cir.), cert. denied, 396 U.S. 958 (1969); United States v. Capaldo, supra; United States v. Irwin, 354 F.2d 192, 198-199 (2d Cir. 1965), cert. denied, 383 U.S. 967 (1966) (defendants warned of "right to remain silent").

In sum, the interrogation of appellant occurred in violation of his Fifth and Sixth Amendment rights. Thus, the indictment should be dismissed unless the Government can show

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indicate that appellant consulted with counsel between the time counsel received the information that appellant was the target and appellant's actual Grand Jury appearance. Accordingly, counsel's statement may very well have been based upon his surmise of appellant's state of mind rather than upon his knowledge of the actual information possessed by appellant. The fact that appellant was arrested and charged before being brought before the Grand Jury would not show that appellant knew he was a target of a particular Grand Jury, or relieve the Government of its obligation to give "target" warnings.

that it was based upon other "legal and probative evidence" before the Grand Jury sufficient to support the charge. See United States v. James, supra, 492 F.2d at 326; see also Goldberg v. United States, 472 F.2d 513, 516 n.4 (2d Cir. 1973). Although the propriety of the indictment was challenged, the District Court apparently never considered whether there was sufficient independent evidence to sustain the indictment. Indeed, the record does not indicate that the District Court had the Grand Jury testimony before it when it reached its decision to deny appellant's motion. Accordingly, we urge that the case be remanded to the District Court for a hearing to determine whether the indictment was based upon sufficient legal evidence, apart from appellant's testimony, to support the charges against appellant.

Point II

APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING WHEN HE WAS REPRESENTED BY AN ASSOCIATE OF TRIAL COUNSEL WHO MADE NO EFFORT TO VERIFY THE ACCURACY OF THE PRESENTENCE REPORT OR TO SUBMIT ANY EVIDENCE IN MITIGATION.

At sentencing, appellant was represented by an associate of trial counsel, apparently designated at the last minute. Given counsel's admitted lack of knowledge about the occurrences at trial, his role as an advocate at sentencing required, even more than in the usual case, that he take pains to ensure that information relied upon by the court for sentencing was accurate, and that he supplement that information if possible. Yet here, the opposite seems to have occurred. Lamentably, associate counsel seemingly failed to request access to perhaps the most critical source in the sentencing determination -- the presentence report -- although he was entitled to access as a matter of right. Moreover, counsel made no effort to supplement the record or document any positive information, apart from a statement in mitigation. On this record, such inaction deprived appellant of the effective assistance of counsel at sentencing. A remand for re-sentence is required.

It is axiomatic that the Sixth Amendment right to effective assistance of counsel applies at sentencing. Mempa v.

Rhay, 389 U.S. 128 (1967); United States v. Burkley, 511 F.2d 47 (4th Cir. 1975); Gasden v. United States, 223 F.2d 627, 630 (D.C. Cir. 1955).[14] More than the mere presence of counsel is necessary. At a minimum, counsel's obligation comprehends the taking of basic steps to ensure that the sentence received is not predicated upon misinformation. Mempa v. Rhay, supra, 389 U.S. at 133, quoting Townsend v. Burke, 334 U.S. 736, 741 (1948). Further, appellant is entitled to "the aid of counsel in marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case as to sentence...." Mempa v. Rhay, supra, 389 U.S. at 135.

The approved draft of the American Bar Association Project on Standards for Criminal Justice includes minimum standards for counsel at sentencing which illustrate the above requirements. The standards include the following:

> (b) Defense counsel should present to the court any ground which will assist in reaching a proper disposition favorable to the accused. If a presentence report or summary is made available to the defense lawyer, he should seek to verify the information contained in it and should be prepared to supplement or challenge it if

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[14] The fact that appellant's trial counsel was retained rather than appointed is, of course, not determinative of his claim of ineffective assistance of counsel. See, e.g., United States v. McCord, 509 F.2d 334, 351 n.63 (D.C. Cir. 1974), cert. denied, 421 U.S. 930 (1975); United States v. Marshall, 488 F.2d 1168, 1169 (9th Cir. 1973); West v. State of Louisiana, 478 F.2d 1026, 1032-1034 (5th Cir. 1973); Goodwin v. Cardwell, 432 F.2d 521, 522 (6th Cir. 1970).

> necessary. If there is no presentence report or if it is not disclosed, he should submit to the court and the prosecution all favorable information relevant to sentencing and in an appropriate case be prepared to suggest a program of rehabilitation based on his exploration of employment, educational and other opportunities made available by community services.
>
> Standards Relating to the Defense Function, ABA Project on Standards for Criminal Justice (Approved Draft 1971) §8.1 at 285.

Accord Standards Relating to Sentencing Alternatives and Procedures, ABA Project on Standards for Criminal Justice (Approved Draft 1971) §5.1. See also Proposed Rules for Sentencing Procedure for the District Courts of New York, Connecticut and Vermont, published in N.Y.L.J. March 18, 1976, at 4 (requiring defense counsel to familiarize himself with the contents of the presentence report two days prior to sentence and permitting or requiring the submission of sentencing memoranda addressed to the presentence report, any additional facts relevant to sentencing, and alternatives to incarceration).

Here, counsel failed to take any of the above steps. Most lamentably, counsel apparently never requested to see the presentence report, although it was available to him as a matter of right under Rule 32(c), Federal Rules of Criminal Procedure, effective December 1, 1975.[15] Counsel thus wilfully deprived

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[15]Rule 32(c) provides as follows:

himself of the opportunity to verify whether the court was exercising its discretion under a misapprehension of fact concerning appellant's previous record, his financial status, his educational background, or numerous other factors critical to a sentencing determination. Counsel necessarily deprived himself of the opportunity to offer rebuttal to any such damaging information. He also denied himself the chance to highlight or supplement those aspects of the report which were favorable to appellant. Counsel's failure to request the report was particularly disturbing given the disadvantages under which he already labored: a late entry into the case and an admitted lack of knowledge of the record as adduced at appellant's trial. If counsel intended to be an active

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(Footnote continued from the preceding page)

(3) Disclosure.

(A) Before imposing sentence the court shall upon request permit the defendant, or his counsel if he is so represented, to read the report of the presentence investigation exclusive of any recommendation as to sentence, but not to the extent that in the opinion of the court the report contains diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons; and the court shall afford the defendant or his counsel an opportunity to comment thereon and, at the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in the presentence report.

advocate, rather than a passive stand-in, he should have at least attempted to verify the information upon which the court was going to rely in sentencing appellant.

This Court has previously emphasized the critical nature of the presentence report, and the possibly disastrous effects of an error of fact or omission. See, e.g., United States v. Rosner, 485 F.2d 1213, 1230-1231 (2d Cir. 1973), cert. denied without prejudice, 417 U.S. 950 (1974); United States v. Malcolm, 432 F.2d 809 (2d Cir. 1970).[16] Indeed, under the Proposed Rules of Sentencing Procedures for the District Courts of New York, Vermont and Connecticut, counsel is not simply afforded the opportunity to examine the presentence report, he is obliged to familiarize himself with it. See Proposed Rules, supra, published in N.Y.L.J. March 18, 1976, at 4. Given the continuous and clear trend requiring disclosure, and the fatal danger of a sentence based upon misinformation, it is impossible to posit counsel's failure to request the report as a "tactical" decision. Rather it was a decision taken in default of knowledge, and hence, was not tactical.

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[16] See H.R. Rep. No. 94-247, 94th Cong., 1st Sess. (1974), at 18. In discussing the amended rule, which eliminated the court's discretion completely to deny access to the presentence report, and which provided for a defense opportunity to rebut challenged factual errors in the report, it was noted: "Since the presentence report is to be used by the court in imposing sentence and since the consequence of any significant inaccuracy can be very serious to the defendant, the Committee believes that it is essential that the presentence report be completely accurate in every material respect."

Counsel compounded his failure to request the presentence report by making no other effort prior to sentencing to supplement the record, or present evidence in mitigation, or recommend alternatives to a sentence of incarceration. Indeed, counsel failed to take any steps recommended by the American Bar Association Standards or the Proposed Sentencing Rules to advance appellant's rights at sentencing apart from his brief statement in mitigation. Those few words, in and of themselves, did not amount to the effective assistance of counsel.[17]

Finally, counsel's breach of duty here was extremely prejudicial, for the court's sentencing decision was based, at least in part, upon evidence which appellant might have been able to controvert. While counsel, in mitigation, claimed that appellant's acts were motivated only to support his family and keep his business afloat (523-524), the Assistant U.S. Attorney claimed that during the time appellant was committing his criminal acts he maintained a substantial bank account and

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[17]Nor was counsel's performance remedied by his filing of a motion to reduce sentence several months after his filing of a notice of appeal. First, the court below was without jurisdiction to hear the motion, since an appeal from the judgment was already pending. See, e.g., United States v. Ellenbogen, 390 F.2d 537 (2d Cir. 1968); United States v. Grabina, 309 F.2d 783, 785 (2d Cir.), cert. denied, 374 U.S. 836 (1962); 9 J. Moore, MOORE'S FEDERAL PRACTICE, ¶203.11 (1972); accord, United States v. Mack, 466 F.2d 333,340 (D.C. Cir. 1972); United States v. Burns, 446 F.2d 898 (9th Cir. 1971). Moreover, the motion suffered from the same deficiencies as counsel's statement at sentencing. Again, retained counsel made no apparent effort to examine the presentence report, and again, counsel made no effort to substantiate the assertions made "upon information and belief."

owned two cars (522). The court seemingly accepted the latter view, for it found that appellant's acts were taken not out of financial desparation, but because "[t]hat's the way you run your business" (524). Counsel surely should have provided appellant the opportunity to prove what counsel asserted. Because counsel failed in his duty, the sentence imposed[18] should be set aside and the case remanded for resentencing.

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[18]We wish to call this Court's attention to the fact that the written judgment and conviction differs from the oral sentencing minutes in two respects. It reports appellant as being sentenced, inter alia, on counts "30-40," rather than "30 and 40," and it reports appellant's probationary period as "five years" rather than "six years." (A probationary term of six years would be illegal. 18 U.S.C. §3651). While the oral sentence, if accurate, must control (United States v. Marquez, 506 F.2d 620 (2d Cir. 1974)), we hesitate to assume that the court unambiguously imposed an illegal sentence and deliberately omitted to impose sentence on several counts in the indictment. Accordingly, we suggest the desirability of a remand to determine the accuracy of the sentencing minutes in the event this Court disagrees with us on the necessity of a remand for resentencing for the reasons stated in Point II.

CONCLUSION

For the reasons stated in Point I, the case should be remanded to the District Court for a hearing to determine to examine the Grand Jury minutes; for the reasons stated in Point II, the case should be remanded for re-sentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

David J. Gallen